against perpetuities, a general power is treated as practically identical with ownership.[14] By dealings inconsistent with the existence of the power a donee is estopped to derogate from his own grant,[15] though a guilty trustee is not.[16] And finally, a universal legacy of "all my property" will pass the property subject to the power.[17]

The conflict between the two theories was neatly illustrated recently. The donee of an English power was domiciled in Holland. By the laws of Holland no person may dispose by will of over seven-eighths of his property, the devolution of the residue being prescribed by law. By a will executed in accordance with all the formal requisites of both countries, she left to her husband "all the property which the law would allow her to dispose of." It was held that the husband took the entire property, not merely seven-eighths. *Re Pryce*, 130 L. T. 415 (Eng., Ch. D., Feb. 20, 1911). Clearly the real question was as to the nature of her relation to the property. It is submitted that the court rightly regarded it as one of agency. The technical doctrine should be disregarded only for strong equitable reasons. On principle there can be no difference between barring dower and barring statutory devolution; nor between allowing the appointee to take under a will which by the law of the donee's domicile could have passed none of his property, and allowing him to take under a will which by the same law could have passed only seven-eighths.[18]

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OBEDIENCE TO ORDERS AS JUSTIFICATION FOR SOLDIER. — Under the federal Constitution, there are three kinds of military jurisdiction: military law, military government, and martial law.[1] "Martial law proper is called into action . . . in times of insurrection or invasion within districts or localities where ordinary law no longer adequately secures public safety and private rights." [2] In some states in times of insurrection, governors have declared a state of "qualified" martial law.[3] And the right so to do has been recognized by the United States Supreme Court.[4] Under martial law, the military overrides the civil power, so

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[14] A general power is not void although it may be exercised at a remote period. Bray *v.* Bree, 2 Cl. & F. 453. The remoteness of an appointment under a general power is reckoned, not from the date of the creation of the power, but from the date of its execution, Mifflin's Appeal, 121 Pa. St. 205; unless the power is exercisable by will only, Genet *v.* Hunt, 113 N. Y. 158; *In re* Powell's Trusts, 39 L. J. Ch. 188. *Contra*, Rous *v.* Jackson, L. R. 29 Ch. D. 521; *In re* Flower, 34 Wk. Rep. 149.

[15] Horner *v.* Swann, 1 Turn. & R. 430. See West *v.* Berney, 1 Russ. & M. 431.

[16] Wetmore *v.* Porter, 92 N. Y. 76.

[17] Wills Act, 1 VICT. c. 26, § 27; Sewall *v.* Wilmer, *supra*. *Contra*, Cotting *v.* De Sartiges, *supra*.

[18] Query: could a statute at the donee's domicile affect his relation to foreign property under a foreign power?

[1] This is the classification of Chase, C. J., in *Ex parte* Milligan, 4 Wall. (U. S.) 2, 141.

[2] See *Ex parte* Milligan, *supra*, 142.

[3] Commonwealth *ex rel.* Wadsworth *v.* Shortall, 206 Pa. St. 165; *Re* Moyer, 35 Colo. 159.

[4] See Luther *v.* Borden, 7 How. (U. S.) 1, 45. This case arose in connection with the Dorr Rebellion in Rhode Island. A late federal case upholds the governor's proc-

that the soldier has a very broad justification for acts done in pursuance of his duty.

But ordinarily the military power of the states is at all times subordinated to the civil power.[5] During a riot the militia is called out to aid the civil authorities, and not to supersede them.[6] In other words the militia, subject to the civil power, acts merely as a body of armed police. The soldier, therefore, while undertaking extra obligations under the military law, is still subject to all his usual liabilities as a citizen.[7] If he commits a crime, or incurs a debt, his military character will not protect him in a civil court. To what extent, then, if at all, is the soldier protected when acting in obedience to the orders of his officers? Obedience to orders should not of itself constitute a complete justification. But a soldier must obey any legal order of his superior. And though he is not bound to carry out any illegal order, yet the discipline of the army or the militia requires that the private shall not question his orders, but obey promptly. So it has been held, that the soldier is protected by orders which are not obviously illegal and unjustifiable.[8]

A recent Kentucky case attempts to define more precisely the limits within which soldiers may lawfully act. *Franks* v. *Smith*, 134 S. W. 484 (Ky.). The defendant, a militiaman on riot duty, under orders to arrest all passers-by carrying concealed weapons, arrested the plaintiff who had a pistol in his buggy. The court assumes that the defendant acted in strict obedience to orders, and holds "as a matter of law that the orders, which a soldier is justifiable in executing, are confined to such as a peace-officer in the discharge of his duty might execute." [9] Since a peace-officer would not have been justified in making this arrest, the plaintiff recovers in an action for false imprisonment. As the function of the militia when called out on riot duty in aid of the civil authorities, is to act as armed police,[10] the case quite correctly defines a justifiable order as one which a peace-officer might execute. And, of course, in obeying such an order the private is protected.[11] If, however, the order be illegal,[12] should not the soldier have a rather broader protection than the principal case suggests? It is necessary to the efficiency of the militia, that apparently reasonable orders be obeyed. If an illegal order appears reasonable, why does the private obey it at his peril? The principal case suggests that if a soldier is not liable when obedient to an illegal though seemingly reasonable order, "any private citizen may at any time and under any circumstances be deprived of his liberty and left without redress." [13] But

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lamation of martial law in the Colorado case in note 3, *supra*. Moyer *v.* Peabody, 148 Fed. 870.

[5] This is a common provision in the bill of rights of the state constitutions, of which § 22, KY. BILL OF RIGHTS is typical. See KY. ST., § 2673 (RUSSELL'S ST., § 4696).

[6] Ela *v.* Smith, 5 Gray (Mass.) 121; State *v.* Coit, 8 Oh. Dec. 62.

[7] See State *v.* Sparks, 27 Tex. 627, 632.

[8] United States *v.* Clark, 31 Fed. 710. See Riggs *v.* State, 3 Coldw. (Tenn.) 85.

[9] Franks *v.* Smith, 134 S. W. 484, 492 (Ky.).

[10] See cases in note 6, *supra*.

[11] Teagarden *v.* Graham, 31 Ind. 422.

[12] Louisiana has a statute typical of those which exist in several states, providing that members of the militia shall not be liable civilly or criminally for acts done while in active service. This gives protection even under an illegal order. LA. ACT, No. 181, p. 371 of 1904, § 21.

[13] See Franks *v.* Smith, 134 S. W. 484, 490 (Ky.).

it is submitted that this argument overlooks both that to afford a justification the command must seem proper, and that, whatever may be the defense of the private, the injured citizen still has his remedy against the officer who issued the illegal order.[14]

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DE FACTO OFFICERS. — The *de facto* doctrine is based on the paramount necessity of protecting the public.[1] With regard to the public the acts of a *de facto* officer are as valid as those of a *de jure* officer. To force outsiders to deal with the former at their peril or to try his title to office on every occasion would be grossly unfair and thoroughly impracticable. Such considerations have led the courts to extend the older and more technical definition [2] of a *de facto* officer to include any one who without legal authority is performing the duties of an office, and "has the reputation of being the officer he assumes to be." [3] The public is also more fully protected if such an officer is held to strict accountability. His defective title, therefore, does not release him from liability for such acts as would be torts or crimes, if done by the *de jure* officer.[4]

Although he might thus incur many burdens, the common law gave him no corresponding benefits. For he could not deny that he was not in fact an "officer." In this matter the common law was rigid but perfectly consistent. A public office was a delegation of certain sovereign powers [5] and was treated in a way analogous to a grant of land.[6] The holder was said to be "seised of his office." If he was removed, his office still continued.[7] If a salary was annexed, it was an office "coupled with an interest." [8] Under such a view, the *de facto* holder was no better than a disseisor, and it followed logically that he was not entitled to any salary,[9] or if it had, in fact, been paid, it could be recovered from him by the *de jure* officer.[10] Such is the prevailing law at the present time.

But there has been a certain tendency to treat offices, and particularly the minor ones, as analogous to contracts of employment.[11] Certain courts have felt that as an officer is a servant of the people, his salary ought to depend upon the services he has rendered them.[12] Such considerations have caused them to relax the older common-law rule and permit the *de facto* officer to recover the salary of the office where there

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[14] The subject of this note under the English law is discussed in DICEY, THE LAW OF THE CONSTITUTION, 7 ed., Ch. VIII and IX.

[1] The leading American case on this subject is State *v.* Carroll, 38 Conn. 449. For a full treatment of this whole subject, see CONSTANTINEAU, THE DE FACTO DOCTRINE.

[2] The older view required "color of an election." Carleton *v.* People, 10 Mich. 250.

[3] Lord Ellenborough in King *v.* Village of Bedford Level, 6 East 356.

[4] Diggs *v.* State, 49 Ala. 311.

[5] United States *v.* Germaine, 99 U. S. 508.

[6] 2 Bl. Comm. 36.

[7] Thus, if an officer was removed for cause he was ineligible for reëlection until the complete term of his old office had expired. State *v.* Rose, 74 Kan. 262.

[8] State *v.* Stanley, 66 N. C. 59.

[9] Dolan *v.* New York, 68 N. Y. 274.

[10] Coughlin *v.* McElroy, 74 Conn. 397. See 15 HARV. L. REV. 675.

[11] Erwin *v.* Jersey City, 60 N. J. L. 141.

[12] Stuhr *v.* Curran, 44 N. J. L. 181.